

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 5172

DOCKETED 01/03/03

ATOMIC SAFETY AND LICENSING BOARD PANEL

SERVED 01/03/03

Before Administrative Judges:

Ann Marshall Young, Chair
Dr. Charles N. Kelber
Lester S. Rubenstein

In the Matter of

DUKE ENERGY CORPORATION

(McGuire Nuclear Station, Units 1 and 2,
Catawba Nuclear Station, Units 1 and 2)

Docket No's. 50-369-LR, 50-370-LR,
50-413-LR, and 50-414-LR

ASLBP No. 02-794-01-LR

January 3, 2003

ORDER

(Ruling on Motion for Extension and Scheduling Telephone Conference)

1. Since the December 16, 2002, status conference held in this proceeding, which concerns the license renewal application of Duke Energy Corporation, seeking approval under 10 C.F.R. Part 54 to renew the operating licenses for its McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2, the Commission issued its Memorandum and Order, CLI-02-28, on December 18, 2002; Duke filed its Motion to Dismiss Consolidated Contention 2 on December 23, 2002; the Intervenor filed their Motion for an Extension of Time to Respond to Duke's motion, on December 31, 2002; and Duke and the Staff filed responses to the Intervenor's motion for extension on January 2, 2003.¹

¹There have also been some e-mail messages: a December 23 request from Duke counsel to reschedule a conference call previously set for January 29, 2003, to a date at the earliest convenience of the Board; a December 31 message from the Chair of the Licensing Board, sent shortly prior to her leaving the office for the day and after consultation with the only other Board member available on that date, to notify all parties of a telephone contact from the Petitioners' counsel that day regarding an intent to file a motion for extension the same date, and of the inclination of the two Board members in response to this contact, in order that all parties could have the information as soon as possible so that they could plan accordingly; and a January 2, 2003, message from NRC Staff Counsel, sent prior to the written motion that was subsequently filed, indicating that the Staff had no objection to the requested extension as long as the Staff is also granted an extension of equal length. For purposes of making a complete record, a copy of these e-mail messages is attached at the end of this order.

2. With regard to their motion for extension, the Intervenors provide as reasons the following: the fact that their counsel was out of the office for the holidays when Duke's motion was filed and did not see it until she returned to work December 30; her inability to contact the directors of lead intervenor BREDL about the motion because they were out of town for the holidays and not expected back until January 6; the fact that the Commission in CLI-02-28 advised that a summary disposition motion would be the best manner in which to resolve the originally-admitted Consolidated Contention 2, which would not require discovery given the evidence already available, see CLI-02-28, slip. op at 16; and the fact that this would require a response to address certain factual and technical issues, necessitating the assistance of the Intervenors' expert, Dr. Lyman, who will be out of the country from January 6 to 15, 2003. The Intervenors also request that Duke's motion be treated as a summary disposition motion, which would make their response due 20 days after filing, or on January 13, 2003, and request a 10-day extension from that, to January 23, 2003, to file their response.

3. Given the obvious difficulties in coordination occasioned by varying holiday schedules, which were unavoidable in the sense that they were already in place when Duke's motion was filed on December 23, 2002, and given that the Staff does not oppose the Intervenors' request for extension so long as they are given an extension of equal length, we find an extension to January 23, 2003, to be appropriate for the filing of the Intervenors' and the Staff's responses to Duke's motion. We make this ruling also in consideration of the Commission's suggestion in its Memorandum and Order, CLI-02-28, slip op. at 16, that the matters addressed in Duke's motion could "best be accomplished through a motion for summary disposition," and of the fact that treating Duke's motion as a motion for summary disposition would make the deadline for response to it January 13, prior to the return of the Petitioners' expert from an apparently previously-planned out-of-country trip. Notwithstanding, as Duke points out in its response to the Intervenors' motion for extension, the Commission's agreement with the Staff "that the resolution of the originally-admitted 'BREDL/NIRS Contention

2 requires no more than a formal finding by the Board,” see CLI-02-28, slip op. at 16, a response to a motion for summary disposition is required under 10 C.F.R. § 2.749(a) to contain a “separate, short and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard.” Thus, at whatever level, the assistance of Dr. Lyman would be a reasonable need of the Intervenors in responding to Duke’s motion.

4. With regard to Duke’s request in its e-mail message of December 23, 2002, that the conference previously set for January 29, 2003, Tr. 1180, be rescheduled to a date at the earliest convenience of the Board, we find this request to be reasonable as well. The earliest date and time that all Board members will be available within the time periods when all counsel can be present is Friday, January 17, at 11:00 a.m. EST. The telephone conference is therefore rescheduled accordingly. All parties shall be prepared at this conference to address all issues arising out of the Commission’s Memorandum and Order, CLI-02-28. **Participants should call 301/231-5539 or 1-800/638-8081 a few minutes before 11:00 a.m. EST on January 17 and give passcode 8523# to be connected in to the conference.**

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD²

/RA/

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 3, 2003

²Copies of this Order were sent this date by Internet e-mail or facsimile transmission, if available, to all participants or counsel for participants.

Attachment: E-mail correspondence of December 23 and 31, 2002, and January 2, 2003

>>> "Repka, David" <DRepka@winston.com> 12/23/02 05:37PM >>>

Attached for filing in Docket Nos. 50-369-LR/50-370-LR/50-413-LR/50-414-LR is Duke Energy Corporation's "Motion to Dismiss Consolidated Contention 2." Hard copies also were served by deposit in the U.S. mail, first class, this afternoon. If you experience problems with this transmission, please contact me at the number below.

In addition, by copy of this e-mail served on the Licensing Board and parties in this case, Duke Energy is requesting that the Licensing Board re-schedule the status call previously set for January 29, 2003. Consistent with the discussion during the December 16, 2002, status call, Duke Energy is requesting an earlier call in light of the Commission's decision in CLI-02-28. The purpose of the earlier call would be to address the path forward (procedure, not substance) to resolution of the previously proposed amended contentions in this proceeding. Duke Energy could support a call at the earliest convenience of the Licensing Board, beginning on Monday, January 6, 2003.

David A. Repka
Winston & Strawn
drepka@winston.com
202-371-5726

>>> Ann Young 12/31 2:32 PM >>>

This is to notify all parties that I received a call from Ms. Curran today, indicating that she wanted to let me know that today she will be filing a motion for extension of time to submit a response to Duke's motion to dismiss, which response would normally be due January 2. Ms. Curran indicated that the reasons for the request include the unavailability of some of her clients and her expert, Dr. Lyman, and that she would be requesting an extension until, as I recall, sometime the week of January 20.

Judge Kelber will not be back into the office until January 2, but I have spoken with Judge Rubenstein today, and we are inclined to look favorably on this request, given the unavailability of Dr. Lyman and Ms. Curran's clients. We are also favorably inclined toward Duke's request to move the January 29 status conference forward, at which time we can discuss how to proceed most efficiently and appropriately in light of CLI-02-28. Once Judge Kelber is back in the office, the three of us will talk together and contact the parties about dates; at the present time, Judge Rubenstein and I are looking at either January 17 or 24 as good dates to hold a telephone status conference, so you might all be looking at your calendars as well.

I am sending this by email as I will be leaving the office shortly, but wanted all parties to have the information as soon as possible so that you can plan accordingly.

Meanwhile, happy new year to all.

Judge Young

>>> Susan Uttal 01/02/03 10:41AM >>>

Dear Judges and Parties;

Since a Licensing Board decision regarding Ms. Curran's motion to extend time to file a response to Duke's motion to dismiss contention 2 may be imminent, based on Judge Young's e-mail of December 31, 2002, I am sending this e-mail to advise the Board and parties of the NRC staff's position. The Staff has no objection to the extension, as long as the Staff is also granted an extension of equal length.

I will file a formal response to Ms. Curran's motion later today.

Respectfully,

Susan Uttal
Counsel for NRC staff

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
DUKE ENERGY CORPORATION) Docket Nos. 50-369/370/413/414-LR
)
(McGuire Nuclear Station, Units 1 and 2;)
Catawba Nuclear Station, Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (RULING ON MOTION FOR EXTENSION AND SCHEDULING TELEPHONE CONFERENCE) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Ann Marshall Young, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Charles N. Kelber
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge, ASLBP
Lester S. Rubenstein
4760 East Country Villa Drive
Tucson, AZ 85718

Susan L. Uttal, Esq.
Antonio Fernández, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Michael S. Tuckman, Executive Vice
President
Nuclear Generation
Duke Energy Corporation
526 South Church Street
P.O. Box 1006
Charlotte, NC 28201-1006

Mary Olson
Director of the Southeast Office
Nuclear Information and Resource Service
729 Haywood Road, 1-A
P.O. Box 7586
Asheville, NC 28802

Janet Marsh Zeller, Executive Director
Blue Ridge Environmental Defense League
P.O. Box 88
Glendale Springs, NC 28629

Docket Nos. 50-369/370/413/414-LR
LB ORDER (RULING ON MOTION FOR EXTENSION
AND SCHEDULING TELEPHONE CONFERENCE)

David A. Repka, Esq.
Anne W. Cottingham, Esq.
Winston & Strawn
1400 L Street, NW
Washington, DC 20005

Lisa F. Vaughn, Esq.
Legal Department
Duke Energy Corporation
526 S. Church Street (EC11X)
P.O. Box 1006
Charlotte, NC 28201-1006

Paul Gunter
Nuclear Information and Resource Service
1424 16th St., NW
Washington, DC 20026

Diane Curran, Esq.
Harmon, Curran, Spielberg
& Eisenberg, L.L.P.
1726 M Street, NW, Suite 600
Washington, DC 20036

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 3rd day of January 2003